



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CIVIL APPEAL NO. 5 OF 2016**

**KENYA POWER & LIGHTING COMPANY LIMITED.....APPLICANT/RESPONDENT**

**VERSUS**

**BRENDA NYAWIRA MWANGI (suing as the legal representative of**

**GEOFFREY MUTHUI MUTHIKE (Deceased).....RESPONDENT/APPLICANT**

**MBEU KITHAKWA.....RESPONDENT**

**RULING**

1. The applicant **Brenda Nyawira Mwangi** (suing as the legal representative of the **Estate of Geoffrey Muthui Muthike** (deceased) who was the plaintiff in the lower court, to be referred to as ‘the applicant’ herein, filed a Notice of Motion under **Order 2 rule 15, Order 42 rules 11, 13 and Order 51 Civil Procedure Rules.**

2. She seeks orders that:

***(i) Spent.***

***(ii) That this appeal be struck out with costs for being scandalous, frivolous, vexatious and an abuse of the process of this court.***

***(iii) That the decretal amount of Ksh.1,637,375.00 be released to Gacheche Wa Miano, Advocate being counsel on record for the respondent/applicant for onward transmission to her.***

***(iv) The respondent be condemned to pay the costs of the application.***

***(v) That this court be pleased to issue any other or further orders as it may deem fit and just to grant.***

3. The application is based on the grounds on the face of the application.

The applicant is saying that the appeal and the prayers are res judicata. That the appellant has failed to take crucial mandatory steps towards the prosecution of the appeal within the mandatory time prescribed by the law. That the applicant is just sitting on an order of stay to mischievously deny the respondent/applicant the fruits of her judgment in the lower court and is not seriously interested in pursuing the appeal. That the appeal is only against an interlocutory order of the lower court and not against the judgment of the lower court and is overtaken by events. That the prayers if granted would not serve legally recognized purpose since the judgment of the lower court would be left intact. Finally that

the appeal is frivolous, vexatious and an abuse of the process of the court.

4. The applicant supports the application with her affidavit sworn on 1<sup>st</sup> December, 2016 reiterating the above grounds.

5. The respondent Kenya Power and Lighting Company Limited who was the defendant in the lower court and is the appellant in this appeal, opposed the application and filed a replying affidavit sworn by Charles Benedict Mwongela on 15<sup>th</sup> December, 2016. According to the Respondent, it is uncontested that the judgment of the lower court was granted *ex parte* due to non-service of the process. The respondent moved to challenge the *ex parte* judgment because it had been denied the right to be heard.

6. The lower court refused to set aside the *ex parte* judgment whereupon they filed and served the record of appeal. The record of appeal was filed on 13<sup>th</sup> September, 2016 and the affidavit of service was filed on 12<sup>th</sup> October, 2016 with a letter to the Deputy Registrar requesting him to fix the appeal for directions. That since writing to court they tried to obtain a mention date to no avail as they were informed that the court diary for the year was closed and were advised to wait for next year' diary.

7. According to the respondent they have done everything possible to expedite the prosecution of the appeal. The court ordered the decretal sum to be deposited in court pending the outcome of the appeal and this application is a disguised appeal against the said court's ruling and should be frowned upon and dismissed. That the applicant was aware of efforts being made to prosecute the appeal as evidence by a letter indicating the fact of the matter, annexure CBM 2.

8. I have considered the application, the affidavits and the submissions. The issues for determination are whether the judgment of the lower court is *res judicata*. Whether the appeal should be struck out.

9. The applicant is contending that the appeal is not against judgment but against a ruling on interlocutory application. That the judgment still stands and is *res-judicata*. Further that the issue of service even if resolved in applicant's favour the judgment will still stand.

10. The respondent filed an application for stay pending appeal. Justice Limo on 16<sup>th</sup> June, 2016 delivered a ruling and ordered that there shall be a stay of execution pending the hearing and determination of the appeal herein. Justice Limo had observed that the issue of service of summons and plaint and the merits of the application dated 23<sup>rd</sup> November, 2015 are issues to be canvassed at the hearing of the appeal. This was in my view an acknowledgment by Hon. Justice Limo that there is an appeal which should be heard and determined on merits.

11. As at the time this ruling was delivered, the respondent had filed a Memorandum of appeal dated 11<sup>th</sup> February, 2016 and filed in court on 12<sup>th</sup> February, 2016. The prayer in the Memorandum of appeal is that the *ex parte* judgment entered on 17<sup>th</sup> April, 2015 in Kerugoya SPMCC No. 12 of 2013 be set aside and vacated and the appellant be granted leave to defend the suit.

12. In the Memorandum, the appellant is challenging an order of the trial magistrate dismissing an application to set aside the default judgment among other grounds.

13. It is therefore clear that there is an appeal against the judgment of the trial magistrate. After Justice Limo ordered a stay of execution of the judgment of the lower court, the appellant filed a record of appeal dated 13<sup>th</sup> September, 2016. There is no dispute that the appellant filed an appeal within the stipulated time provided under **Section 79 G** of the **Civil Procedure Act** which provides:-

***“Every appeal from a sub-ordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against.....”***

14. Though the Memorandum of Appeal was filed after a ruling of the court in an application to set aside

ex parte judgment, which was denied the appellant seeks to set aside the judgment of the lower court. There is clearly an appeal against the judgment of the lower court. The judgment was entered on 17<sup>th</sup> April, 2015. The ruling on the application dated 23<sup>rd</sup> November, 2015 was delivered on 5<sup>th</sup> February, 2016. It is therefore not true to say that judgment was entered after the ruling on interlocutory application.

15. The application was to set aside ex-parte judgment and once it was refused, the appellant moved to this court. I hold that there is an appeal against the judgment of the lower court.

16. It is the view of the applicant that the appellant has failed to pursue the appeal within the time mandatorily set by the law. The applicant depones that the appeal was filed on 12<sup>th</sup> February, 2016. That there was non-compliance of **Order 42 rule II Civil Procedure Rules**.

17. The appellant submits that the record of appeal was filed on 14<sup>th</sup> September, 2016 as they had to attach the order and the proceedings. **Order 42 rule 2 Civil Procedure Rules** provides:-

***“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until copy is filed.”***

18. The Memorandum of Appeal filed on 12<sup>th</sup> February, 2016 did not have a certified copy of the decree or order. As such the appellant had to comply with **Order 42 rule 2**. The court did not order the time frame within which the appellant had to file the record of appeal. It is noted that parties were canvassing an application for stay of execution pending appeal whose ruling was given on 16<sup>th</sup> June, 2016. The appellant was directed to expedite the disposal of appeal by taking necessary action to have appeal placed before this court for further action as soon as possible. This ruling is the only evidence on directions on the appeal given by the judge.

19. From the affidavit sworn by the respondent, the record of appeal was filed on 14<sup>th</sup> September, 2016 and served on the counsel for the respondent the same day. The counsel for the appellant wrote to the Deputy Registrar on 12<sup>th</sup> October, 2016 requesting for the fixing of the hearing date for mention for direction, **annexture CBM -1**. No mention date was given and attempts to get a date in the registry was in vain. This has not been denied. The appellant took action within 30 days as required upon filing of the record of appeal to cause the matter listed before the judge. The matter was not listed through no fault of his own. They did not sit on the order of stay.

20. The appellant filed the record of appeal within three months after the ruling of 16<sup>th</sup> June, 2016. The delay was not inordinate.

21. The appeal is on the right to be heard. As submitted it is at the heart of the administration of justice. The appeal should be heard on merit. **Article 159 (2) (d)** of the **Constitution** provides:

***“In exercising judicial authority, courts and tribunals shall be guided by the following principles-***

***Justice shall be administered without undue regard to procedural technicalities.”***

Further **Section 1A** and **1B** of the **Civil Procedure Act** provides that the court should seek to do justice. **Section 1A** provides:-

***“The overriding objectives of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes governed y the Act.”***

The court has a duty to seek to give effect to the overriding objectives.

22. The Constitution guarantees the right to be heard.

23. The ruling of Justice Limo, supra stated that there were matters which needed to be determined on appeal. The claim by the applicant that there is no appeal is as submitted an attempt to challenge the ruling of Justice Limo without following the right procedure. I find that there is an appeal which ought to be heard on merit. The appeal is not vexatious, frivolous or scandalous as it seeks the right to be heard. Justice Limo held that there is an issue of service which needs to be determined on appeal. The appeal raises substantial issues.

24. On the issue of *res judicata*, the applicant states that the judgment of the lower court still stands. That even if the issue of service is resolved in appellants favour the judgment will still stand. With respect this is wrong. If the Court finds that there was no proper service, it will hold that the judgment was irregular with the consequence that it may be set aside with all consequential orders.

25. *Res judicata* is a point of law. It is one of the factors which limit jurisdiction of the court. It is a doctrine that requires that there should be an end to litigation or conclusiveness of judgment. Where a court has decided and issued judgment, then parties should not be allowed to litigate over the same issues again. It requires that if in a suit which determines issues in dispute between two parties is determined, the decision is enough. It is a bar to subsequent proceedings involving the same issue which has been determined by a competent court.

26. This is defined at **Section 7** of the **Civil Procedure Act** which provides:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigation under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”***

27. The fact that there is an ex parte judgment of the lower court does not fall within the above definition. The submission that the judgment is *res judicata* is a misapprehension of the law. The judgment is not *res judicata* in view of the pending appeal.

28. I am of the view that the appeal should be heard on merits. I find that this application lacks merits. I dismiss it. The appellant shall comply with the order of Justice Limo with regard to have the appeal heard and determined expeditiously. Costs in the appeal.

***Dated and delivered at Kerugoya this 3<sup>rd</sup> day of March, 2017.***

**L. W. GITARI**

**JUDGE**

Read out in open court in the presence of Mr. Miano for Applicant, Mr. Kamenju holding brief for Mwangera for Respondent, court assistant Naomi Murage this 3<sup>rd</sup> day of March, 2017.

**L. W. GITARI**

**JUDGE**

**3.3.2017**